No. 21-___

IN THE

Supreme Court of the United States

STEVEN B. BARGER,

Petitioner,

v.

FIRST DATA CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Shawn E. Shearer
Counsel of Record
THE LAW OFFICE OF
SHAWN SHEARER, P.C.
3839 McKinney Avenue #155-254
Dallas, TX 75204
(214) 272-9533
shawn@shearerlaw.pro

QUESTIONS PRESENTED

The statutory language of the Family and Medical Leave Act, 29 U. S.C. § 2601 *et seq.* ("FMLA") provides that employees are "entitled to be restored" to work at the end of leave. Does the word "entitled" have any meaning?

The Petitioner took FMLA leave to recover from surgery. The Petitioner timely delivered the required physician's certification to return to work and he requested restoration. The Petitioner was not restored, but instead was terminated as a cost savings measure by his employer. The district court and the Second Circuit did not find these admitted acts by the employer to be in violation of the FMLA.

The Questions Presented are:

1. Whether the FMLA prohibits an employer from refusing to restore an employee to work when the employee has timely requested restoration and satisfied all conditions to restoration (*e.g.* delivery of a physician's clearance to return to work)?

2. Whether the FMLA prohibits an employer from terminating an employee requesting restoration based upon the employer's desire to eliminate the future compensation expense arising from that employee's return?

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit
No. 19-3538

Unpublished Summary Order

Steven B. Barger, *Plaintiff-Appellant*, v. First Data Corporation, *Defendant-Appellee.* Frank Bisignano, Dan Charron, Anthony Marino, Karen Whalen, Lori Graesser, Rhonda Johnson, *Defendants*.

Order Affirming Trial Court:	July 6, 2021
Order Denying Rehearing:	August 6, 2021

United States District Court for the
Eastern District of New York

Case No. 1:17-cv-4869-FB-LB

Unpublished

Jury Verdict Judgment:	September 26, 2019
Order Denying Motion for New Trial:	September 16, 2020

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The summary order of the United States Court of Appeals for the Second Circuit (App. 1a-9a) affirming the trial court is unreported. The Second Circuit order denying Petitioner's request for panel rehearing or rehearing *en banc* (App. 10a) is unreported. The district court's opinion denying Petitioner's request for a new trial is unreported. (App. 12a)

JURISDICTION

The Second Circuit order affirming the trial court was entered in July 6, 2021 (App. 1a). Petitioner's timely petitioned for rehearing and that petition was denied on August 6, 2021 (App. 10a). This writ is filed within 90 days after the denial of rehearing. The Court has jurisdiction under 28 U. S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Family and Medical Leave Act (FMLA)
29 U.S.C. § 2614(a)(1, 3 & 4)
Restoration to Position
(in Relevant Part)

(1) IN GENERAL

Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

. . .

(3) LIMITATIONS

Nothing in this section shall be construed to entitle any restored employee to –

(A) the accrual of any seniority or employment benefits during any leave period; or

(B) any right, benefit or position of employment other than any rights, benefit, or position to which the employee would have been entitled had the employee not taken leave.

(4) CERTIFICATION

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the healthcare provider of the employee that the employee is able to resume work . . .

STATEMENT

A. Summary of Facts

Mr. Barger (Petitioner) took FMLA leave to recover from cancer surgery. Mr. Barger timely delivered a physician's certification to return to work. Mr. Barger timely requested to be restored to work. First Data (Respondent) did not restore Mr. Barger to his position or an equivalent position, but instead terminated Mr. Barger to "save" the projected future compensation that would be payable if he had returned to work.

B. FMLA Disclosures and Assurances

First Data's employee handbook provides:

> While on FMLA, an [employee's] job is protected. . .

When the Petitioner's leave began, First Data provided him FMLA Rights and Responsibilities disclosures that stated:

> If I am on FMLA leave . . ., and I return to work prior to exhaustion of that approved time, I will be restored to my same or equivalent position.

First Data's Executive Vice President of Human Resources personally assured Petitioner of job protection in a text message he sent to Petitioner when leave commenced:

> When you return your salary restored [sic] and you will be given a comparable job.

These representations were false. Petitioner's job was not protected and he was not restored. Employers across the country make similar FMLA representations to their employees on a daily basis. After the Second Circuit decision below, these daily representations to millions of employees may be false as well.

C. Petitioner's Leave and Request for Restoration

First Data designated Petitioner's twelve week FMLA leave to expire on January 16, 2017 and, as permitted by the FMLA, conditioned Petitioner's return to work on delivery of a physician's certification that he could work without restrictions.

While on leave, Petitioner's job responsibilities were transferred on an "interim" basis to an employee earning less annual compensation than the Petitioner.

Three weeks prior to the end of designated leave, Petitioner advised his direct supervisor, HR officers, and other executive officers, of his intent to return to work timely.

One week prior to the end of designated leave, Petitioner delivered First Data his physician's certification to return without restrictions, and scheduled himself to return the beginning of the following week.

Three days after Petitioner delivered his physician's certificate, after the close of business on the business day prior to Petitioner's scheduled return, First Data's VP of HR (who was the same person who accepted Petitioner's physician's certification) telephoned and advised Petitioner (i) not to come to work as scheduled, and (ii) he was being

placed on "non-working" status from January 17, 2017 to February 28, 2017, at which time he would be terminated.[1]

After his termination, Petitioner's job functions continued to be performed by his interim replacement on a permanent basis.

D. First Data's "Reduction-in-Force" Defense

In 2016, First Data was a large, publically traded company serving clients in more than 100 countries, with approximately 24,000 employees and 5,000 independent contractors worldwide.[2] Petitioner was a Senior Vice President of First Data.

Several weeks after Petitioner began his FMLA leave, First Data began evaluating a reduction in headcount among its top 3,000 highest paid employees worldwide. This process began by assembling a list of all of those 3,000 employees. Petitioner and 2,999 other individuals were on that list. Individuals were selected from the list and advised of their termination in November and December. Petitioner was not included in these reductions and remained on designated FMLA leave.

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[1] The VP of HR made this call at the direction of the EVP of HR (the same individual who had promised Petitioner job protection by text message and who was responsible for coordinating the planning of the reductions).

[2] First Data Form 10-K for Fiscal Year 2016 pgs. 4-15. https://www.sec.gov/Archives/edgar/data/0000883980/000162828017001722/a12311610-k.htm

In late December, Petitioner advised his direct supervisor and HR of his intent to timely return from leave in January.[3]

Two weeks after Petitioner advised of his intended return, First Data's CEO decided that the first round of terminations in November and December ("First Round") did not achieve sufficient future compensation expense savings, and directed the EVP of HR to begin planning further reductions from the list of the top 3,000 most highly compensated employees worldwide ("Second Round").

Days after the Second Round planning began, human resources personnel communicated, in anticipation of Petitioner's return, regarding the need for a physician's certificate to be delivered. Petitioner delivered his physician's certificate and requested restoration. No employees had been terminated, or advised of termination, in the Second Round at the time the Petitioner delivered his certification and scheduled his return.

Petitioner was told the business day before his scheduled return that he was not to return to work, he was on non-working status, and he would be terminated effective in six weeks.

First Data calls these terminations, "reductions-in-force" or "restructurings." But, the terminations were not localized. There was not a plant or office closure, elimination of an entire shift, or a similar event impacting an identifiable group of employees. The terminations spanned all

[3] The FMLA and its implementing regulations promote communication between employees and their employer during leave. *See, e.g.* 29 C.F.R. §825.311(c).

operating units across the entire company, both domestically and internationally.

Ultimately, the total terminations in the First Round and Second Round combined were only 362 employees out of the top 3,000 of First Data's 24,000 employees -- approximately 1.5% of First Data's total world-wide employees.

First Data testified that these reductions were designed to reduce projected future compensation expense and to "restructure" the company.

First Data claims Petitioner's position was eliminated, but admits his functions were still being performed by a lower salaried employee. Petitioner was selected for the Second Round of reductions. First Data's defense is that under these circumstances it was not obligated to restore Petitioner to his position or an equivalent position despite his timely request to be restored.

For comparison, for a company of 150 employees that is subject to the FMLA, every single employee termination would be considered a "reduction-in-force" using First Data's nomenclature. Should every single termination be subject to a "reduction-in-force" defense under the FMLA? The FMLA would have no meaning if that were the case.

E. The Reduction Selection Process

The termination selection process involved First Data creating a list of the top 3,000 most highly compensated employees. This list was then broken down into smaller lists by functional area. Each Executive Vice President was provided the subset of the list containing only those employees within that EVP's department to be consider for inclusion in the reduction.

No objective criteria (e. g. seniority, or employee work performance and review grading) was provided to the EVPs for selecting individuals to be included or excluded. Each EVP chose individuals from their sub-list in their own discretion. The sole criteria was to reduce future projected compensation expense in their area of responsibility. Without objective selection criteria, there is no way to know whether Petitioner would have been included had he been at work, instead of on leave, and interacting daily with the decision-maker.[4]

[4] When Petitioner's leave commenced, First Data blocked his access to his work e-mail and access to First Data's remote work systems.

F. Request for Restoration Resulted in Termination

First Data routinely allowed employees with serious health conditions to remain on leave past their designated FMLA period.[5] This extended leave was referred to as ADA or disability leave. The employee would be on unpaid leave, not "protected" by the FMLA, but would receive disability benefit payments. The extended leave allowed employees to receive these disability employment benefits that would be unavailable if the employee were terminated for failing to return at the end of designated FMLA leave.

First Data's long term disability benefits were paid completely by First Data's disability insurer. Had Petitioner remained on disability leave beyond his designated FMLA period, Petitioner would have received long term disability funded 100% by the insurer. In other words, if Petitioner did not seek restoration, but instead stayed on extended leave, First Data would have incurred no compensation expense by keeping him on the rolls as an employee on disability leave.[6]

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[5] In addressing the issue of leave designation in *Ragsdale,* the Court noted (i) the congressional encouragement of employers to adopt more generous policies than those in the FMLA, (ii) the fact that the practice of providing more than 12-weeks leave was not uncommon, and (iii) that nearly two-thirds of employer's provide disability leave. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U. S. 81, 87 (2002).

[6] First Data had no health insurance expense related to the Petitioner, as his insurance was through Medicare.

The timeline of events is important to Petitioner's claims.

• October 24th	Designated leave commences
• November/December	First Round of Reductions (Petitioner is not included)
• December 22nd to January 6th	Petitioner advises his direct supervisor and HR of his intent to return in January
• January 5th	CEO directs HR to begin planning Second Round of Reductions
• January 6th – 9th	HR, anticipating Petitioner's return, internally communicates regarding need for physician's certification before allowing Petitioner to return. (EVP of HR, organizing Second Round planning, did not tell HR not to accept physician's certificate – Petitioner not selected as of January 9th)
• January 10th	Petitioner delivers his physician's certification and schedules January 17th for return
• January 13th	Petitioner advised not to come to work and is placed on "non-working status" until February 28th
• February 28th	Petitioner is terminated

During the First Round of reductions, Petitioner had not yet expressed to First Data management that he intended to timely return, and Petitioner was not selected for termination in the First Round.

Petitioner announced his intent to return before planning of the Second Round began. The EVP of HR and his direct reports communicated between January 6th and 9th to internally assure that Petitioner must deliver a physician's certificate to return. If Petitioner had been selected for the reduction prior to January 9th, these communications make no sense. Petitioner delivered his physician's certificate (i.e. exercised his right to restoration) before selections were made in the Second Round.

Absent Petitioner's request to be restored, there was no future compensation expense for First Data to "save" by terminating him. Had Petitioner stayed on extended leave, his disability benefits would have been paid by the disability insurer, and terminating him would not "save" any future expense.

It was only after Petitioner advised of, and then requested, timely restoration that he had projected future salary that could be "saved" by including him in the Second Round.

Petitioner could have taken extended leave and collected disability benefits until they were exhausted, and he would not have been included in the Second Round. It was not the taking of leave that was a factor in his selection, it was his attempt to return from leave, and his future restored salary that were the reasons for his termination in the Second Round.

First Data admits it did not restore Petitioner. First Data admits the purpose of terminating Petitioner was to

eliminate his future compensation expense. First Data's defense, accepted by the Second Circuit, is that an employer may refuse to reinstate, and even terminate, an employee requesting to return from leave based on the employer's business judgment to eliminate future compensation expense that would be payable if the employee returned.

The minimal nature of the terminations (362 out of 24,000 employees world-wide) combined with First Data's defense, if applied to smaller enterprises, will effectively exempt nearly every employer from complying with the restoration requirement of the FMLA.

The ramifications of this business judgment, future cost-saving defense on the FMLA are substantial. The defense, if permitted, guts the FMLA of all meaning. If an employer adjusts to an absence of an employee on FMLA leave, the employer need only cite cost savings as grounds for denying restoration and justifying termination.

G. Petitioner's Interference and Retaliation Claims

Petitioner filed suit alleging both interference (failure to restore) and retaliation (termination) in violation of the FMLA 29 U. S.C. § 2615(a).

(i) Interference by Failure to Restore. Petitioner claims First Data interfered with Petitioner's entitlement to be restored to his position or an equivalent position. Upon acceptance of Petitioner's physician's certification, Petitioner had satisfied all statutory conditions to restoration, and First Data was statutorily required to restore him to his position or equivalent position.

(ii) Retaliation for Seeking Restoration of Salary. The DOL regulations prohibit an employer from using an employee's exercise of his rights under the FMLA as a negative factor in employment decisions. 29 C.F.R. § 825.220(c). Petitioner's request to return triggered his future compensation expense. The purpose of the reductions was to eliminate projected future compensation expense. Restoration of Petitioner's compensation was a factor used in selecting him for the reduction. Petitioner alleges a termination based on an employer seeking to avoid salary expense that would be paid upon restoration constitutes retaliation against Petitioner for exercising his entitlement to be restored. The jury was not instructed to determine if Petitioner's attempted return was a factor in his termination.

H. Proceedings Below

The district court denied cross-motions for summary judgment. A jury trial was held. The jury returned a verdict for the defendant. Petitioner's motion for a new trial was denied.

Petitioner appealed to the Second Circuit asserting:

(i) As a matter of law, upon acceptance of Petitioner's physician's certificate, First Data had an affirmative duty to restore Petitioner to his position or an equivalent position and it did not do so; and

(ii) The jury instruction failed to state the law of both claims (interference and retaliation).

The FMLA jury instruction (App. 24a-25a) never mentioned the entitlement to restoration. The jury instruction failed to advise the jury of the standard in 29 C.F.R. § 825.214 (restoration is required even if replaced or restructured while on leave). The jury instruction misstated First Data's burden of proof under 29 C.F.R. § 825.216(a). The instruction improperly placed the burden on Petitioner to prove the reduction was a "cover-up" for retaliation against Petitioner for "taking leave." Petitioner's argument that it was his request to return that was a motivating factor in his termination was not presented to the jury.

The Second Circuit upheld the trial court's judgment. (App. 1a-9a) Petitioner's timely requests for panel and *en banc* rehearing were denied. (App. 10a)

REASONS FOR GRANTING THE PETITION

Since passage of the FMLA, the DOL and judiciary have rebalanced the interests of employers and employees contrary to the balance codified by Congress. The Court should provide guidance to all interested parties, including Congress, the Department of Labor, employers, and employees, as to the scope of rights, responsibilities, and obligations under the statutory language of the Act.

At the signing of the FMLA, President Clinton stated:

> I think all of us should acknowledge that it was America's families who have beaten the gridlock in Washington to pass family leave.... I'm very proud that the first bill I am to sign as President truly puts people first…. Family medical leave has always had the support of a majority of Americans, from every part of the country, from every walk of life, from both political parties. But some people opposed it. And they were powerful, and it took 8 years and two vetoes to make this legislation law of the land. Now millions of our people will no longer have to choose between their jobs and their families… I know that men and women are more productive when they are sure they won't lose their job because they're trying to be good parents, good children. Our businesses should not lose the services of these dedicated Americans.
>
> Family medical leave is a matter of pure common sense. And a matter of common decency. It

> will provide Americans what they need most: peace of mind.[7]

In the FMLA, Congress stated that one of its primary purposes was to address the "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U. S.C. § 2601(a)(4).

The lynchpin to job security is the entitlement to be restored. A right to take unpaid leave alone is meaningless, as it adds little to the already existing right of an employee to quit. It is the restoration entitlement that provides job security as promised.

The Second Circuit decision stands for the proposition that if an employee takes leave, and the employer uses a cheaper interim replacement, the employer may refuse reinstatement and terminate the employee requesting to return as a cost savings measure. This is contrary to the intent and purpose of the FMLA. In fact, it is exactly the type of business decision the FMLA was designed to curtail.

The Court should grant this writ no matter the outcome on the merits after argument. If the Second Circuit decision is not reversed, the Court has an obligation to declare to Americans and Congress that the job security and peace of mind promised by the President and Congress do not exist. Employees, again, must now worry about their job when they take leave. If the Second Circuit decision is reversed, this Court should announce to employer's that they are required to restore employees at the end of leave and that

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[7] https://millercenter.org/the-presidency/presidential-speeches/february-5-1993-remarks-signing-family-medical-leave-act

terminating employees seeking to return to avoid paying their salary is unlawful.

The Court should grant certiorari and decide the two Questions Presented in this petition for the following reasons:

- The Second Circuit decision directly conflicts with this Court's description of the FMLA restoration entitlement as requiring reinstatement upon timely return from leave. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U. S. 81, 87 (2002).

- The Second Circuit decision directly conflicts with holdings in the Third, Sixth and Seventh Circuits (each having held that an employer must restore upon delivery of a physician's certificate).

- The Second Circuit's decision is contrary to the understanding of American workers that a job is secure while on leave. This understanding is justified based upon the disclosures provided by employers and within the Department of Labor proscribed forms of disclosure. This Court should resolve these questions so that American's understand whether the disclosures they are being provided are accurate or not.

- The issue of restoration from leave under the FMLA is of national importance and impacts the work-family balance decisions of tens of millions of individuals and families across the country. The Second Circuit's analysis would apply to all covered forms of FMLA leave, including leave by new parents, and parents taking leave to care for a child. Much of the entire workforce is impacted.

- Over the thirty-years since adoption of the FMLA, the lower courts have slowly created judicial exceptions to the statutory restoration entitlement that are not grounded in statutory language. The mantra of "the right to restoration is not absolute" has been repeated, including by the Second Circuit, but without any clearly defined criteria for when restoration can be denied, if at all, when timely requested. Only the Court can address the ongoing usurpation of that congressional constitutional authority.

- The Second Circuit decision is inconsistent with, and failed to defer to, the plain, unambiguous terms of the DOL regulations.

- The Second Circuit decision reads the statutory entitlement to restoration to an equivalent position completely out of the statute.

- This case is the perfect vehicle to address these issues. Petitioner had an unblemished and successful 40-year career as an officer at financial institutions, including a 30-year stint on Wall Street. Many reported FMLA cases involve absenteeism or serial abusers of leave. This was the Petitioner's first leave in his career and he was forced to take it. Many FMLA cases involve an employee with pre-existing performance issues. The Petitioner was not subject to any employment discipline or written negative performance reviews. In this case, Petitioner did everything right under the FMLA. He obtained his physician's certificate and timely requested return. He was not reinstated, but was terminated to save the cost of his salary when he came back. These clear-cut facts provide the perfect opportunity for the

Court to define the scope and substance, including delineations of any exceptions, to the "entitlement to be restored" in the FMLA as written and adopted by Congress.

I. CONFLICT WITH THIS COURT'S STATEMENT ON THE RESTORATION ENTITLEMENT IN *RAGSDALE*.

In discussing the FMLA in the context of leave designation by an employer, the Court briefly described the entitlement to restoration under the FMLA:

> Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent.

Ragsdale v. Wolverine World Wide, 535 U. S. 81, 87 (2002).

The Court's understating of the entitlement, as expressed in *Ragsdale*, is consistent with the job security purpose of the statute, the content of the FMLA disclosures provided daily to employees across the country, and most worker's understanding of their rights under the FMLA. Most importantly, this understanding reflects the plain, unambiguous language adopted by Congress.

In this case, however, the Second Circuit found that even when an employee requests reinstatement timely, the employer may refuse to reinstate that employee to any position (former position or equivalent) and may terminate that employee as a cost savings measure.

The Court should grant this writ to clarify whether the Court's prior statement in *Ragsdale* is an accurate statement of the law. If so, this writ must be granted to correct the Second Circuit's legal error.

II. CIRCUIT SPLIT ON THE FUNDAMENTAL QUESTION OF SUBSTANTIVE RIGHTS UNDER THE FMLA CREATED BY THE DECISION BELOW.

The FMLA was designed to establish national family and medical leave minimum standards for employee rights and employer obligations. The Second Circuit decision in this case creates a split among circuits as to substantive rights and obligations of employees and employers under the FMLA. The entitlement to restoration now varies based upon geography, and the Second Circuit is the outlier.

The Third, Sixth and Seventh Circuits have held, consistent with *Ragsdale*, that upon timely delivery of a physician's certificate, the employer is statutorily required to restore the employee.

See *Brumbalogh v. Camelot*, 427 F. 3d 996, 1004 (6th Cir. 2005); *James v. Hyatt Regency Chicago*, 707 F. 3d 775, 780 (7th Cir. 2013)(agreeing with the holding of Brumbalogh); *Budhun v. Reasing Hosp. & Med. Ctr.*, 765 F. 3d 245, 253-254 (3rd Cir. 2014)(citing *Brumbalogh* and *James*, duty to reinstate is triggered upon delivery of certificate containing no work restrictions); *Harrell v. U. S. Postal Serv.*, 415 F. 3d 700, 713 (7th Cir. 2005).

The Sixth Circuit held in *Brumbalogh*, 427 F. 3d at 1004:

> Accordingly, we hold that once an employee submits a statement from her health care provider which indicates she may return to work, the employer's duty to reinstate has been triggered under the FMLA.

The Seventh Circuit held in *Harrell*, 415 F. 3d at 713:

> The FMLA and its regulations simply prevent an employer . . . from denying a return to work by an employee who has been absent on FMLA leave and who presents, upon his return, the requisite certification from his physician.

The Third Circuit, citing the Sixth and Seventh Circuits, agreed that delivery of a physician's release without work restrictions requires an employer to restore. *Budhun*, 765 F. 3d at 253-254.

The Second Circuit, in the decision in this case, concluded the complete opposite:

> [Petitioner's] contention that he had an absolute right to be restored upon delivery of his physician's release, regardless of whether his position would have been eliminated had he not taken leave,[8] is without merit. (App. 6a)

[8] The Second Circuit order ignores 29 U. S.C. § 2614(a)(1)(B), the entitlement to an equivalent position. That equivalent position entitlement was triggered upon delivery of his certification, even if Petitioner's original position was not available. Further, the instruction never asked the jury to make any determination as to what would have occurred had Petitioner been at work. The instruction merely asked if Petitioner was included in a reduction, not whether Petitioner would have been part of the 2,638 employees in the top 3,000 not included in the reduction had he been at work.

If a worker in Fort Lee, New Jersey, timely delivers a physician's certificate, the Third Circuit requires restoration. In contrast, if that same employee works in Manhattan, a mere drive across the George Washington Bridge, the Second Circuit has ruled restoration is not required, and the employee's duties may be reassigned, and the employee terminated to "save" future compensation expense even after providing medical clearance.

This substantial difference in federal entitlements based upon lines drawn on a map, or bridges to be crossed, can only be addressed by this Court.

The Third, Sixth and Seventh Circuit holdings are correct. 29 U. S.C. § 2614(a)(1) provides a statutory entitlement to restoration. 29 U. S.C. § 2614(a)(4) permits an employer to "condition" return from leave on the employee's delivery of a physician's certificate. Once an employee satisfies the condition to restoration, there is no statutory provision that permits an employer to deny an employee's statutory entitlement to restoration.

The Court should hear this case to resolve the circuit conflict on the interpretation of the most important job security provision in the FMLA – the entitlement to restoration.

III. THE ISSUES PRESENTED ARE OF NATIONWIDE SCOPE AND IMPORTANCE AND IMPACT A VAST PORTION OF THE POPULATION.

In 1994, Justice O'Connor discussed her recovery from cancer surgery with the New York Times and was quoted as saying:

> The best thing about all of this is that I had a job to go to. I didn't miss anything, and it was hard, but I was grateful that I had my work to do.[9]

American workers do not have lifetime appointments, and many rely upon the FMLA to protect their job while they are on leave to address major life events, such as the Petitioner recovering from cancer surgery. The Petitioner, like millions of others taking leave to address their own personal, serious health issues, find strength in the desire to get back to work and their knowledge a job is there for them.

The Petitioner did everything properly. He was diagnosed with cancer and had drastic surgery to avoid otherwise certain death. He went on FMLA leave to recover. He communicated with the company about his intent to return and timing of his return. He obtained and timely delivered his physician's certification to return to work, and he requested reinstatement.

The Petitioner's request was refused. He was not restored. The Petitioner instead was terminated because the employer did not wish to reinstate his salary.

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[9] *New York Times,* Nov. 5, 1994, Section 1, Page 12.

This same scenario could take place for any reason for which FMLA leave is available. For example, take a new parent on unpaid FMLA leave for the birth or adoption of a child who timely requests to return to work. Under the Second Circuit's decision, the employer may refuse to restore this new parent to work, and even terminate them, if the employer learned to "get-by" without that new parent during leave, and can justify the termination as cost savings.

The same could apply in today's circumstances if an employee or family member requires COVID care. An employee could take leave to recover, and then learn when they are well and ready to return that they have been replaced and then terminated as a cost savings measure.

These results are contrary to the language of the FMLA and contrary to its core purpose of job security and peace of mind while on leave.

The Second Circuit's decision in this case has vast implications impacting tens of millions of workers relying on the FMLA. The opinion will have collateral effects on children and family members needing temporary care by a working parent, spouse or child, including those needing to address the needs of service members in their family. These caregivers now will need to weigh job risk against family obligations, exactly what the FMLA sought to address. New parents will have to reconsider taking leave upon arrival of a new child to the family. This is contrary to the congressional purpose of addressing the need for new parents to be able to participate in early child rearing. 29 U. S.C. § 2601(a)(2).

Congress found that the lack of employment policies to accommodate working parents was forcing them to choose between job security and parenting. 29 U. S.C. § 2601(a)(4). Over three decades, the FMLA may have brought new leave policies into the workplace, but the Second Circuit decision makes those policies irrelevant because it guts job security through finding a broad, cost-savings exception to the restoration entitlement.

The FMLA provides unpaid leave. While on leave, the employee foregoes pay, but that sacrifice is based on the congressional promise, and the employee's justified belief that their job, or an equivalent, and their future income, will be available if a timely request to return is made. An employee on unpaid FMLA, believing a job and salary await, does not seek alternative employment while on leave. Learning of termination upon requesting restoration is fundamentally unfair and contrary to the purpose of the FMLA.

The Second Circuit opinion in this case destroys the core bargain between employer and employee reached through the congressional process over eight years in adopting the FMLA. The Second Circuit places us back in the pre-FMLA world where employers may grant leave, but then refuse reinstatement because they adjusted to the employee's absence.

In fact, the Second Circuit opinion places us in a worse situation than before the adoption of the FMLA. At least before the FMLA workers knew their job was at risk if they took leave. Today, after the Second Circuit's opinion, workers are told their job is secure, but that is a lie. According

to the Second Circuit, employees can be replaced, terminated, and their duties reassigned while on leave in the name of saving the cost of their salary upon return.

This result is wrong. This result is contrary to the job security purpose of the FMLA. This result is inconsistent with the statutory language of the FMLA to which the Second Circuit was obligated to defer.

The ramifications of the Second Circuit's decision are vast. This Court should issue its opinion on the scope of the FMLA restoration entitlement so that it will either reassure employees of the FMLA's job protection or dissuade employees from believing such job security exists under the law. American workers deserve this Court's resolution and pronouncement on these questions.

IV. THIS CASE PROVIDES THE PERFECT VEHICLE FOR THE COURT TO RESOLVE THE CONFLICTING, CONFUSING, AND INCONSISTENT LOWER COURT AND DEPARTMENT OF LABOR FMLA RULINGS AND PRONOUNCEMENTS.

Whether or not the Petitioner is successful in this appeal, the process of the Court definitively settling the conflicting and inconsistent interpretations of the FMLA entitlement to restoration among the lower courts and the DOL has value in and of itself. This case provides a perfect, clean set of facts to address the restoration entitlement.

A. The Second Circuit decision is inconsistent with Department of Labor form disclosures.

Every day documents such as employee policy manuals, FMLA rights and responsibility disclosures, leave application forms, FMLA posters in break rooms, etc., all promise job protection if an employee takes FMLA leave. At the beginning of leave, the Petitioner received such documents and assurances containing promises of job protection.

If the Second Circuit is correct, and employers may refuse to restore an employee requesting to return to work, and may even terminate that employee as a cost savings measure, the disclosures being provided to millions of American's are false, and are a fraud on American workers.

American workers must know whether or not the content of these documents is true or not. This Court is the last resort to decide whether or not an entitlement to restoration exists and, if so, the scope of any exceptions to that entitlement.

Either the statutory entitlement to restoration has meaning, or the disclosures being provided to employees

must be revised. The Court's *Ragsdale* decision had the direct impact of forcing revisions to the disclosures regarding leave designation. This Court's opinion is required to either affirm the disclosures being made regarding job protection while on leave, or to provide legal direction for revisions to be made if there are limitations to that protection. American worker's deserve for the leave disclosures they are provided to be an accurate statement of their rights.

B. The Second Circuit decision conflicts with the plain and ordinary meaning of the statutory text.

The process of statutory construction implicates the role of the judiciary in light of the authority of Congress and the Executive. This case raises several statutory construction and interpretation questions that must be resolved by this Court.

Neither the district court nor the court of appeals, given numerous opportunities, ever addressed the statutory construction issues presented. The Second Circuit decision is inconsistent with both congressional and executive authority.

1. Improper Judicial Creation of Exceptions to the Statutory Restoration Entitlement

Exceptions to statutory requirements should not be read into the statute when those exceptions are not provided by Congress. *United States v. Smith*, 499 U. S. 160, 166-67 (1991) ("Courts and regulators are not to create exceptions in addition to those specified by Congress").

The Second Circuit finding a business justification exception to the "entitlement" to restoration (e.g. saving future salary expense) is inconsistent with the plain and ordinary meaning of the term "entitled."

The rule of interpretation is that, in the absence of a statutorily specified or technical meaning, the Court should follow the ordinary usage and dictionary definition of terms. *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 64 (1989). There is no specified or technical meaning assigned to "entitled" in the FMLA. The ordinary dictionary meaning of "entitled" is a right to have something; in this case, a right to be restored to work.[10]

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[10] An "entitlement" is the right to do or have something. *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/English/entitlement; *Oxford Dictionary,* https://www.lexico.com/en/ definition/entitlement; *Black's Law Dictionary 2nd Ed.*, https://thelawdictionary.org/entitle/ ("In its usual sense, to entitle is to give a right or title.)

The restoration language in 29 U.S.C. § 2614(a)(1) is clear and unambiguous:

> Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Using the ordinary meaning of "entitled," Congress granted Petitioner the right to be restored by First Data.[11]

Section 2614(a)(1) clearly states, in unambiguous language, that the only exception to this entitlement is contained in § 2614(b). The parties agree that subsection (b) is inapplicable in this case. Therefore, if the express subsection (b) exception does not apply, there are no express statutory exceptions to the right of Petitioner to be reinstated at the end of leave. There is no "reduction-in-force" or "business reason" defense in the statute. Upon requesting reinstatement the employee has the statutory right to

[11] The statutory grant of an entitlement, or right, to employees to be restored, and the corresponding obligation imposed upon employers to restore, is an intentional congressional act to modify any "at-will" nature of the employment relationship between them.

be, and must be, restored. The Second Circuit created an exception without statutory basis.

The Second Circuit and others, including the DOL, improperly rely on § 2614(a)(3)(B) as providing an exception to the § 2614(a)(1) restoration entitlement. This interpretation is incorrect.

Section 2614(a)(3) provides (emphasis added):

> Nothing in this section shall be construed to entitle any restored employee to-
>
> (A) the accrual of any seniority or employment benefit during leave; or
>
> (B) any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave.

Section 2614(a)(3) cannot be read as an exception to the entitlement contained in Section 2614(a)(1) for the following reasons.

(i) The general maxim of construction is the expression of one exception implies the exclusion of other exceptions. *O'Melveny & Myers v. FDIC*, 512 U. S. 79, 86-87 (1994), *Jett v. Dallas Indep. Sch. Dist.*, 491 U. S. 701, 730-31 (1989). The restoration entitlement grant in (a)(1) provides "except as provided in subsection (b)" the employee is entitled to be restored. Subsection (a)(1) does not say "except as provided in subsection (a)(3) or (b)". Congress identified only subsection (b) as an exception to the entitlement in (a)(1). When subsection (a)(1) specifically lists only

one exception, courts, and regulators, may not read additional exceptions into the statute that were not created by Congress.

(ii) Congress demonstrated its ability to specifically cross-reference conditions on the restoration entitlement granted in subsection (a)(1). In subsection (a)(4) Congress provided, "As a condition of restoration under paragraph (1)" the employer may require a physician's certification to return. Had Congress intended (a)(3) to limit the entitlement in (a)(1), then in subsection (a)(3) Congress would have cross-referenced (a)(1) in the same manner as done in (a)(4). Subsection (a)(3) does not cross-reference (a)(1) and cannot be read as an exception. Statutory provisions should not be interpreted in a way that is inconsistent with the structure of the statute. See *Eli Lilly & Co v. Medtronic, Inc.*, 496 U. S. 661, 668-69 (1990). Reading (a)(3) as an exception to (a)(1) is inconsistent with the structure of both the express subsection (b) exception in (a)(1) and the specific practice of cross-referencing (a)(1) as demonstrated in (a)(4).

(iii) In the plain, unambiguous terms of subsection (a)(3) (emphasized in the quote above), subsection (a)(3) only governs post-leave rights of "restored" employees. "Restored" is past tense in (a)(3). The Second Circuit improperly interprets "restored" to also include an employee on leave. This construction is contrary to simple rules of grammar. An employee on leave with an entitlement "to be restored" (future) cannot be a "restored" employee (past) while on leave. Subsection (a)(3) cannot be read grammatically as an exception to (a)(1). See *Niz-Chavez v. Garland*, 141 S. Ct.

> 1474, 1482 (2021)("When it comes to discerning the ordinary meaning of words, there are perhaps no better places to start than the rules governing their usage."). Subsection (a)(1) entitles employees to be restored at the end of leave. Subsection (a)(3) provides that when they return from leave the FMLA does not grant them additional rights. Subsection (a)(3) applies after restoration, not before. Reading the past tense "restored" in (a)(3) as an exception to the entitlement "to be restored" in (a)(1) conflicts with basic grammatical rules.

For the same reasons as above, the Petitioner also asserts a *Chevron* challenge to the DOL regulation, 29 C.F.R. § 825.216(a), permitting termination of employees while on leave, as being inconsistent with the statute.[12]

The lower courts and the Department of Labor, at the insistence of employers, have gradually worn-down the express "entitlement" (i.e. right) to reinstatement vested in employees seeking to return from leave. The Second Circuit has now reduced the entitlement to meaninglessness. The Second Circuit's cost savings exception has swallowed the congressional restoration entitlement rule.

The Court should grant this writ to address these statutory construction and interpretation issues, and to correct the imbalance between employee and employer rights

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[12] The regulation, 29 C.F.R. §825.216(a)(1), takes the additional step of adding the term "no greater right to reinstatement" to the list of limited rights. The statute, 29 U.S.C. §2614(a)(3)(B), does not include the right to reinstatement. The DOL's regulation including a limitation on reinstatement rights is directly contrary to the express, unambiguous words of Congress in the statute.

through the judicial creation of exceptions to congressional rules that are not based upon the words adopted by Congress and codified in the statute.

2. Nullification of Entitlement to Equivalent Position

A statute should be construed and interpreted in a manner that does not render other provisions of the statute superfluous or unnecessary. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U. S. 552, 562 (1990).

The Second Circuits decision cites only the elimination of Petitioner's former position as grounds for refusing reinstatement. (App. 5a-7a)

However, basing the decision solely on position elimination ignores, and is contrary to, the statutory language. Congress specifically addressed the situation where the original position is unavailable when restoration is requested. In such situations, Congress granted the employee an entitlement to be restored to an equivalent position. 29 U. S.C. § 2614(a)(1)(B). The language of the statute requires the employer, in such situations, to restore the employee to an equivalent.

The Second Circuit's construction, focusing solely on the original position, ignores and makes wholly irrelevant, the entitlement to an equivalent position. Whether or not the original position existed when Petitioner requested restoration, Petitioner was still statutorily entitled to restoration to an equivalent position at the end of leave. Allowing a failure to restore due to the non-availability of the original position nullifies the entitlement to an equivalent position.

The Court should clarify that reassigning duties and claiming a position was eliminated does not relieve an employer of the statutory obligation to restore to an equivalent position.

3. Inconsistent Interpretation of Statutory Terms

Courts should interpret the same or similar terms in a statute in the same way. *Sullivan v. Stroop*, 496 U. S. 478, 484-85 (1990). Identical words used in different parts of the same act are intended to have the same meaning. *Sorenson v. Secretary of Treasury*, 475 U. S. 851, 860 (1986).

The statutory terms granting the entitlement to take leave and the entitlement to be restored are nearly identical in their operative language. *Compare* 29 U. S.C. § 2612 and § 2614(a)(1).

For the leave entitlement, 29 U. S.C. § 2612, the courts consistently hold that if an employee satisfies the conditions to take FMLA leave, and properly requests leave, the employer must grant leave. There is no provision in the FMLA that allows an employer to deny leave based upon the financial condition of the company. In opposing adoption of the FMLA, employers expressed business reasons for not wanting Congress to adopt the entitlement to leave. Congress balanced these concerns with needs of employees. The FMLA was designed to force employers to adapt to business issues they face in complying with the FMLA entitlements. The employer cannot cite business reasons, whether actual or fabricated, for refusing the leave request.

There is no basis in the statutory language to interpret the restoration entitlement differently than that given to the entitlement to leave.

Just as with a leave request, if an employee on FMLA leave for a proper purpose requests restoration timely, and satisfies the statutory physician certification condition for restoration (if applicable), the statute requires the employer to restore the employee to the original position or an equivalent. The entitlement language of both sections is nearly identical, and should be interpreted the same.

Business reasons or not, there is nothing in the FMLA that permits an employer to refuse a timely restoration request. Section 2614(a)(1) is clear that upon a timely request the employee is entitled to be restored by the employer. There is no statutory basis for job elimination or saving of future compensation expense to justify failure to restore an employee requesting to return to work.

C. The Second Circuit decision conflicts with the plain meaning of Department of Labor regulations.

In addition to judicially nullifying the congressional grant of an entitlement, the Second Circuit decision also fails to enforce the clear and unambiguous regulations promulgated by the DOL.

An employer's violation of the DOL's FMLA regulations "constitute[s] interfering with, restraining or denying the exercise of rights provided by the Act." 29 C.F.R. § 825.220(b).

Replaced or Restructured – 29 C.F.R. § 825.214

29 C.F.R. § 825.214 provides, in part:

> An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

This regulation, in effect, implements the equivalent position provision discussed above.

First Data's reassignment of Petitioner's duties while he was on leave does not absolve the employer from the reinstatement requirement.

Under 29 C.F.R. § 825.214, an employer's replacement of an employee or the restructuring of an employee's position while on leave is not a defense to a failure to restore upon timely request.

Employer's Burden of Proof – 29 C.F.R. § 825.216(a)

DOL regulation, 29 C.F.R. § 825.216(a)(1), provides certain circumstances under which an employee may be terminated while on leave. Assuming the validity of this regulation, the district court and Second Circuit failed to hold First Data to its burden of proof.

In pertinent part, 29 C.F.R. § 825.216(a) provides (emphasis added):

> An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement was requested in order to deny restoration . . .
> (1) . . . An employer would have the burden of proving that an employee would have been laid-off during the FMLA period, and therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.[13]

This regulation requires the employer to prove the employee would have been terminated "prior to" requesting reinstatement, and that the employee would have been laid-off during the leave period.

The facts of this case do not meet this standard. Petitioner was listed with 2,999 others, but was ntot included

[13] Petitioner further asserts that placing him on "non-working" status for six-weeks until his termination constituted an independent violation. Placing Petitioner in a position slated for lay-off violates the express terms of 29 C.F.R. § 825.216(a)(1).

in the First Round that occurred prior to his restoration request. The Petitioner requested restoration on January 10th. First Data notified Petitioner of his non-working status and future termination on January 13th, Petitioner's designated leave ended on January 16th, and termination occurred on February 28th. The Petitioner was not terminated prior to requesting reinstatement or during the leave period. First Data cannot meet the 29 C.F.R. § 825.216(a) burdens.

Retaliation for Exercise of Entitlements – 29 C.F.R. § 825.220(c)

The decisions below fail to consider 29 C.F.R. § 825.220(c) which prohibits an employer from considering an employee's exercise of FMLA entitlements as a negative factor in employment decisions. In this case, it was the Petitioner's intent to return to work (i.e. the exercise of his right to restoration) which triggered his inclusion in the Second Round of reductions. The Second Circuit decision, allowing an employer to take into account future compensation expense upon return as a reason for termination, directly conflicts with the negative factor prohibition in 29 C.F.R. § 825.220(c). An employer cannot take an employee's future restored salary into account in deciding whether or not to restore or terminate. Doing so is retaliation, and interference with, the employee's entitlement to be restored.

Regulatory Conclusions

The district court, in the jury instruction, and the Second Circuit on appeal, have crafted a new exception to the entitlement to restoration ignoring the specific language in 29 C.F.R. §§ 825.214, .216(a), & .220(c). Denying restoration, and or terminating, due to replacement or restructuring while on leave is prohibited. It is not a defense to assert Petitioner was terminated after requesting restoration. An employer may not consider restoration, and corresponding salary restoration, as a negative factor in employment decisions. Yet, the courts below have so allowed. These conclusions are inconsistent with the statutory purpose, the statutory language, and the language of the regulations.

This Court should intervene. The Second Circuit has failed to defer to the executive interpretations of the employer's burdens in failure to restore cases such as this.

D. Policy decisions are the province of Congress; the creation of exceptions to congressional entitlements exceeds the constitutional judicial and executive authority.

Liability and damages issues should be separated in the analysis. Decisions finding exceptions to the entitlement to restoration often conflate the two.

Congress balanced the interest of employers and employees when it adopted the FMLA. The language was chosen carefully over many years. The executive and judiciary may not rebalance these interest in favor of their own preferred policy.

Ultimately, all of these machinations in the lower courts have made the term "entitled to be restored" adopted by Congress utterly meaningless. The clear statutory language has been discarded in favor of employer interests. The relative rights and obligations have been rebalanced and the job security once thought provided by the FMLA is non-existent.

This judicial re-writing of the rules is akin to what the Court described in *Bostock v. Clayton Cnty. GA*, 590 U. S. ___, 140 S. Ct. 1731, 1753 (2020):

> If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. The place to make new legislation, or address unwanted consequences of old legislation lies in Congress. When it comes

> to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from addition to statutes requires us to refrain from diminishing them.

As this Court described in *Ragsdale*, the command of the FMLA is simple. If an employee timely requests reinstatement, the employer must reinstate that employee to his position or an equivalent. That the policy reflected therein is undesirable to some does not grant the judiciary the authority to modify the statute through the creation of exceptions - that is the province of Congress.

The entitlement to restoration; expressed so plainly and clearly by Congress, has been diluted. The lower courts have strayed from their obligation to apply the statutory language of the entitlement to restoration as written and adopted by Congress. The job security purpose has been eliminated. Over thirty-years, the FMLA has been substantially diminished. The Second Circuit decision has turned the FMLA on its head; restoration from leave is no longer an employee entitlement, but rather it is now an employer option whether to restore or not. First Data's actions were 180-degrees off from the intent and language of the FMLA. The FMLA is not intended to provide a twelve week training period for a lower paid replacement of the employee on leave. Despite the FMLA's existence, an employer may now refuse reinstatement when requested on the basis of

not wanting to pay the employee's salary going forward upon their request to return.

Congress, by statute, granted Petitioner an entitlement (right) to be restored at the end of leave. Congress, by statute, placed an obligation on First Data to restore Petitioner to his position or an equivalent. There is no statutory language limiting such right and obligation.

First Data conditioned return on a physician's certification. First Data HR (including the EVP) was anticipating Petitioner's return the day before Petitioner delivered his physician's certificate. First Data required a certification, and it received one. The Petitioner requested restoration, but was terminated instead. The violation of the FMLA appears blatant, but was excused by the courts below.

This Court has never addressed the language and substantive meaning of the entitlement to be restored granted to employees by Congress, and it should do so now. This case provides a clean set of facts to clearly draw the lines.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Shawn Shearer
Counsel of Record
THE LAW OFFICE OF
SHAWN SHEARER, P.C.
3839 McKinney Ave.
Suite 155-254
Dallas, Texas 75204
(214) 272-9533
shawn@shearerlaw.pro

November 2, 2021

Attorney for Petitioner